LE COPY

FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 34

TIMES FILM CORPORATION,

Petitioner,

v.

CITY OF CHICAGO, RICHARD J. DALEY and TIMOTHY J. O'CONNOR,

Respondents.

BRIEF ON BEHALF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING

SIDNEY A. SCHREIBER,
Attorney for Motion Picture Association of America, Inc., as Amicus Curiae.

BARBARA A. SCOTT,
of Counsel.

INDEX

Table of Cases Cited

Articles, Periodicals and Other Miscellaneous Material Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 34

TIMES FILM CORPORATION,

Petitioner,

v.

CITY OF CHICAGO, RICHARD J. DALEY and TIMOTHY J. O'CONNOR,

Respondents.

BRIEF ON BEHALF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING

Motion Picture Association of America, which was granted leave to file briefs as *amicus curiae* (364 U. S. 805), submits this brief in support of the petition of Times Film Corporation for rehearing of the cause decided by the Court's opinion rendered January 23, 1961.

Summary of Grounds for Rehearing

The Court misconstrued the question presented and the contentions advanced. It therefore (1) premised its decision on dicta which did not intend the conclusion reached and (2) failed to consider, alternative to administrative censorship, the availability of more moderate regulation as illustrated by the decision of the Illinois Appellate Court in *City of Aurora* v. *Warner Bros. Distributing Corp.*, 16 Ill. App. 2d 273, 147 N. E. 2d 694 (1958).

Justice Clark, writing for the majority, posed the question for decision by the Court to be "whether the ambit of constitutional protection includes complete and absolute freedom to exhibit at least once any and every kind of motion picture." Disposition of that question was based on rejection of, as unsound, petitioner's supposed contentions that "the public exhibition of motion pictures must be allowed under any circumstances," and that "the state's sole remedy is the invocation of criminal process * * * and then only after a transgression."

This was neither the question presented nor the contention advanced by the petitioner or the *amicus curiae*. Both recognized throughout the right of a community to suppress certain classes of constitutionally unprotected speech (*Amicus Curiae* Brief, MPA, pp. 3, 26). The attack here was upon the unconstitutionality of the *method* employed by the City of Chicago—a method which excludes from public showing *all* films until after inspection by the licensor, not upon the right of the community to control objectionable matter.

I

Having formulated the question broader than presented or necessarily present and having stated the contentions for the claimed liberty from censorship inspection broader than advanced, or needed to be advanced, the Court then proceeded to reason that dicta in its prior cases to the effect that not all prior restraints of speech may be invalid, required the rejection of that claim. Although the dicta cited in *Near* v. *Minnesota*, 283 U. S. 697, 715-716; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 502; *Roth* v. *United States*, 354 U. S. 476, 483, and *Kingsley Books* v. *Brown*, 354 U. S. 436, 441, may indicate such a conclusion from the "perspective", the opinion selected, they are not authority against the proposition presented by petitioner,

namely, that the Constitution gives immunity from an administrative censorship which bars publication of a form of expression of speech prior to inspection and approval. As Chief Justice Warren states in his dissent to so interpret the dicta of those cases is "contrary to the intention at the time of their rendition".

In the landmark *Near* case, Chief Justice Hughes, upon analysis of its "operation and effect", considered a state statute which empowered injunctions against publications adjudged obscene or defamatory to be "but a step to a complete system of censorship". He ruled it unconstitutional for otherwise there would be "admission of the authority of the censor against which the constitutional barrier was erected" (283 U. S. 697, 721).

In his reference to the constitutional barrier erected against the "authority of the censor", Chief Justice Hughes mentioned no exceptions or limitations.

In his reference to the constitutional immunity from previous restraints generally, Chief Justice Hughes did mention limitations "of an exceptional nature" (*id.* pp. 715-716). Those he described as relating to war-time emergencies are not pertinent here. It is noteworthy that Chief Justice Hughes' description of them was based on and followed that of Professor Zachariah Chafee's book on Freedom of Speech (1920 Edition, p. 10), to which he referred in a footnote in the opinion.

Then Chief Justice Hughes added the sentence with which we are most concerned here: "On similar grounds the primary requirements of decency may be enforced against obscene publications" (id., p. 716). For this statement no authority was cited, but when one looks at the full text of what Chafee had said and to which Chief Justice Hughes had referred, it is apparent that the Chief Justice was again paraphrasing and following Chafee. Reproduced below is the full paragraph from Chafee to which the Supreme Court refers:

> "* * * In some respects this [Blackstone's] theory goes altogether too far in restricting state action. The prohibition of previous restraint would not allow the government to prevent a newspaper from publishing the sailing dates of transports or the number of troops in a sector. It would render illegal removal of an indecent poster from a billboard or the censorship of moving pictures which has been held valid under a free speech clause. * * *" [Citing *Mutual Film Corp.* v. *Industrial Commission of Ohio*, 236 U. S. 230.] (Chafee, Freedom of Speech, pp. 9-10 (1920).)

From this history and textual analysis, it would appear that Chief Justice Hughes in this sentence was referring to the removal of an offensive poster and possibly the censorship of motion pictures, when motion pictures were not accorded First Amendment protection.[1]

In *Mutual Film Corp.* v. *Ohio Indus'l Comm.*, 236 U. S. 230, which denied motion pictures that protection, it was said: "* * * [F]reedom of opinion and its expression * * * are too certain to need discussion" (236 U. S. 230, 243). The implication was that, as a member of the press, motion pictures would have been entitled to freedom from censorship.

It is demonstrable that Mr. Justice Murphy in speaking in *Chaplinsky* of "prevention" of certain well-defined and narrowly limited classes of speech which included the obscene, was in no way envisaging the constitutional validity of a system of licensing the dissemination of ideas in order to prevent obscenity. This should be clear from what is known of Mr. Justice Murphy's views that because of their vast potentialities in communication, discussion

---

[1] Cf. the analysis of the passage under consideration by Professor Emerson, *The Doctrine of Prior Restraint*, 20 Law and Contemporary Problems, 648, 661: "The entire passage remains obscure. It may be that the Chief Justice merely intended to make the traditional point that seditious and obscene publications were subject to subsequent punishment as exceptions to the First Amendment."

and propaganda, the character and extent of governmental control of the mass media was a matter of grave and serious concern.[2]

By his use of the word "prevention" Mr. Justice Murphy apparently meant no more than did Mr. Justice Holmes in his use of the term in consideration of a statute which made it a crime to circulate certain written matter. Mr. Justice Holmes wrote:

> "It does not appear and is not likely that the statute will be construed to *prevent* publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general." *Fox* v. *Washington*, 236 U. S. 273, 277. (Emphasis added.)

In *Burstyn*, which did much toward freeing motion pictures from obvious excesses of the censor, the dicta from *Near* and *Chaplinsky* are repeated, yet at the same time it was significantly observed that when limitation of speech by prior restraint is challenged, the State has a heavy burden to demonstrate that an exceptional case is presented (343 U. S. at 504).

Roth, which dealt with a prosecution under a criminal statute for obscenity, made no mention of the problem of the constitutional validity of a prior restraint of all publications in order to reach an obscene one. *Kingsley* v. *Brown* applied to a New York statute empowering an injunction against further distribution of a publication

---

[2] See his opinions (dissenting) in *Nat. Broadcasting Co.* v. *U. S.* 238, 319 U. S. 190, 227-238 (regulation of radio by F. C. C.); *Associated Press* v. *U. S.*, 326 U. S. 1, 49, antitrust action by the Attorney General against newspaper publishers. See also his opinion in *Thornhill* v. *Alabama*, 310 U. S. 88, 96-98, and Charles Fahy, *The Judicial Philosophy of Mr. Justice Murphy*, 60 Yale Law J. 812 (1951).

adjudged "obscene" the same analysis as did *Near*, namely, operation and effect in substance, to see whether the result was or was not "censorship", and found the statutory scheme to "preclude what may fairly be deemed licensing or censorship", observing that the statute "studiously withholds restraint upon matters not already published and not yet found to be offensive" (354 U. S. at pp. 441, 445).

The dicta of *Near*, *Burstyn* and *Kingsley*, far from indicating an adverse decision on the question expressly saved in *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, and presented by the instant action, pointed to the Court's striking down the Chicago ordinance, buttressed as they were by a multitude of "free speech" cases based upon and following *Near*,[3] many of which are cited in Chief Justice Warren's dissent.

---

[3] See Hendel, Samuel, Charles Evans Hughes and the Supreme Court, 1951, where the author, in commenting on the importance of the *Near* decision by Chief Justice Hughes, quotes this comment on *Near*, Professor Chafee made in his later book, Free Speech in the United States, 1941, p. 381:

> "Its strong hostility to previous restraints against the expression of ideas may conceivably be applied to quite different forms of censorship, affecting other media of communication beside the press," and goes on to say—
>
> "While Professor Chafee's anticipations have not yet been substantially realized, it is true that the *Near* case has served as a landmark in attempts to batter down the restrictions of previous restraint and may yet play a part in curbing censorship in related fields." (pp. 149-150)

II

The Court refused to invalidate Chicago's complete censorship system, because it would not limit the city's choice of administrative censorship as a remedy to cope with the "dangers of obscenity".[4]

The possibility is extremely remote that motion picture theatres in Chicago, to any extent beyond the extremely rare occurrence of deliberate law breaking, would exhibit to the public motion pictures which were obscene in violation of Illinois' penal law against obscenity, to which, as the Illinois Court said, must be assimilated the definition of the word in the censorship ordinance. (*Amer. Civil Liberties Union* v. *Chicago*, 3 Ill. 2d 334, 121 N. E. 2d 585.) The number of motion pictures distributed to theatres in the United States for exhibition to the theatregoing public which even the most narrow minded would claim to be legally "obscene" is a negligible percentage.

True it is that some exhibitors in Chicago might exhibit a motion picture which the censors for reasons might seek to hold obscene. The censors did so with the motion picture THE MIRACLE, despite the fact that the members of this Court had viewed the picture, described it in its opinion in the *Burstyn* case, and found that it could not by governmental authority be barred from view. The Court was apprised how arbitrarily, in practice, Chicago applied its ordinance in its purported effort to deal with obscenity

---

[4] As to obscenity the Court pointed out that petitioner did not attack any specific standard in the ordinance, which among other standards imposes the standard of obscenity. But as to obscenity see *Holmby* v. *Vaughan*, 350 U. S. 870, analyzed and commented upon in Nimmer, The Constitutionality of Official Censorship of Motion Pictures, 25 U. Chi. L. Rev., 625, 634-635. The *Holmby* case is omitted from the list of prior motion picture cases decided by the Court which involved questions of standards, cited and summarized in footnote No. 3 of the opinion of the Court.

and how the Courts in review had repeatedly had to curb the censor.

The Court should reconsider whether the city's interest in protecting against obscenity required its ordinance to be upheld in a decision which may engender the proliferation of similar ordinances in the hundreds of cities and towns in the United States. No medium could flourish in the overall interests of the public or perhaps even survive at all if that should take place. The judgment weighing interests made in *Near* would seem peculiarly applicable here. There, Chief Justice Hughes pointed out that "the fact that the liberty of the press may be abused by a miscreant does not make any less necessary the immunity of the press from prior restraint", and, in rejection of the State's asserted interest in suppressing the evil of notorious publications of scandals and scurrilous matter, pointed out that in the theory of the constitutional guaranty "even a more serious public evil would be caused by authority to prevent publications" (283 U. S. 697, 720, 722).

Moreover the Court by premising its decision on the broader question and supposed contentions precluded consideration of the existence or availability of less restrictive means of achieving the same objective. This was completely contrary to the principle previously established by this Court in a long line of decisions which examined the constitutionality of statutory schemes which attempted to control thought or expression. *Shelton* v. *Tucker*, 364 U. S. 479, 488, 493 and cases cited therein; *Talley* v. *California*, 362 U. S. 60; *Dennis* v. *United States*, 341 U. S. 494, 542.

Justice Harlan, concurring in the *Talley* case, *supra*, delineated the Court's approach to the examination of statutory action impinging on speech thus:

> "In judging the validity of municipal action affecting rights of speech or association protected against invasion by the Fourteenth Amendment, I do not believe that we can escape, as Mr. Justice Roberts

> said in *Schneider* v. *State*, 308 U. S. 147, 161, 'the delicate and difficult task' of weighing 'the circumstances' and appraising 'the substantiality of the reasons advanced in support of the regulation of the free enjoyment of' speech. More recently we have said that state action impinging on free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling. See *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 463, 464; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 265 (concurring opinion); see also *Bates* v. *Little Rock*, 361 U. S. 516." (at p. 66)

And as recently as this Term, Justice Stewart, speaking for the majority in the *Shelton* case, reaffirmed the principle:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties *when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.*" (at p. 488) (Emphasis added)

Of course it must be assumed that the majority of the Court in reaching its conclusion in the *Times Film* case was well aware of its recent holding in the *Shelton* case, cited in Justice Warren's dissenting opinion, but it is not apparent that the Court was fully cognizant of all of the alternatives open to Chicago and other municipalities in the prevention of the showing of motion pictures which offend because they may be obscene.

In *City of Aurora* v. *Warner Bros. Distributing Corp.*, *supra* (cited at p. 3, *amicus curiae* brief MPA) the Illinois Court of Appeals upheld the use of a preliminary injunction to restrain the exhibition of the motion picture BABY DOLL. BABY DOLL had been booked for exhibition on January 29, 1957 in the Paramount theatre in Aurora, Illinois. Aurora had no ordinance requiring the submission of all films for licensing prior to exhibition. But BABY DOLL, based on a

play of Tennessee Williams and directed by Elia Kazan, like all motion pictures exhibited nationally was known by "reputation." On the day the picture was scheduled to open, the local authorities applied for a preliminary injunction forbidding its exhibition. Affidavits in support of and in opposition to the injunction were proffered and after argument the Court entered a preliminary injunction enjoining the exhibition until further order. The Appellate Court of Illinois upheld the injunction, concluding that the City had made a *prima facie* showing that the picture was obscene under the test established by this Court in *Roth* v. *United States*, 354 U. S. 476.

There was never any public exhibition of this motion picture in the City of Aurora.

Control of the exhibition of obscene motion pictures by injunction (not unlike the procedure sanctioned by this Court in *Kingsley* v. *Brown, supra*) has been sanctioned by the Illinois Courts. Experience has shown that the avowed governmental purpose can be achieved without "broadly stifling fundamental * * * liberties" by subjecting *all* speech, protected or unprotected, to administrative examination and licensing.

The Court's posing of the question and its subsequent failure to consider the procedure adopted in the *Aurora* case erroneously led it to premise its decision on a choice between no control by the state, that is "complete and absolute freedom" to exhibit, on the one hand, and the imposition of administrative censorship on the other. It can only be concluded that the Court believed that given this choice it was necessary to uphold, with respect to motion pictures, unlike any other media, administrative censorship. It is respectfully submitted that the Court was presented with a broader choice which it failed to consider. Consideration of the application of this equally effective but less embracing method of control of speech should lead to the conclusion that an ordinance requiring

submission of *all* motion pictures for licensing goes far beyond what is necessary to achieve "a legitimate governmental purpose".

Few decisions of the Court in recent years have given rise to such widespread public interest evidenced by editorial comment in the press all over the country. Although the opinion of the majority insists that the Court's present sanction of administrative censorship of a medium of expression entitled to constitutional guarantees is presently confined only to motion pictures, the public apparently cannot appreciate the distinction made by the Court and is apprehensive of the effect of the decision rendered by so closely divided a Court.[5]

CONCLUSION

For the reasons advanced, we respectfully submit that this Court grant a rehearing of this cause, restore this case to the docket and allow the filing of additional briefs and oral argument.

Respectfully submitted,

SIDNEY A. SCHREIBER,
Attorney for Motion Picture Association of America, Inc., as Amicus Curiae.

BARBARA A. SCOTT,
of Counsel.

---

[5] The complexity and importance before a divided court of somewhat related issues in a free speech case, *Winters* v. *New York*, 333 U. S. 507, 518, resulted in three arguments.

Certificate of Counsel

I hereby certify that I am counsel for the *amicus curiae* Motion Picture Association of America and that the foregoing brief in support of the petition for rehearing is in my opinion well founded in law and fact and is proper to be filed herein and is presented in good faith and not for delay.

Respectfully submitted,

SIDNEY A. SCHREIBER.